UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 1

MANAGEMENT & TRAINING CORPORATION

Respondent,

and **CASE NO.: 01-CA-267261**

IUE-CWA, THE INDUSTRIAL DIVISION OF THE COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Charging Party.

RESPONDENT'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Pursuant to Section 102.24 of the Rules and Regulations of the National Labor Relations Board ("NLRB" or "Board"), Respondent Management & Training Corporation ("MTC") submits this brief reply memorandum in support of its Motion for Summary Judgment ("MSJ"). As described below, Counsel for the General Counsel's ("CGC") Opposition to the MSJ ("Opposition") is premised on a series of misrepresentations of the law and summary judgment procedure. There are no genuine disputes of fact that would bar the Board's issuance of summary judgment. Indeed, the CGC's Opposition effectively concedes that there was no unilateral change in the status quo. The Board should grant Respondent's Motion for Summary Judgment and order dismissal of the Complaint.

ARGUMENT

1. Respondent's denial of allegations in the Complaint does not prevent summary judgment from being awarded.

In opposing MTC's motion, counsel for the General Counsel effectively advocates for the elimination of the Board's summary judgment procedure. CGC argues that because MTC has

denied some allegations in the Complaint via its Answer, a hearing is warranted and summary judgment must be denied on that basis. This is not the standard for summary judgment, and if it were, it would eviscerate the availability of summary judgment for respondents. *See, e.g.*, *Lhoist N. Am. of Tennessee, Inc.,* 362 NLRB 958, 959 (2015) (concurring opinion) ("[i]f the 'simple denial of unlawful conduct' in a respondent's answer to a complaint raises a 'material question' that defeats summary judgment, the Board would never grant a motion for summary judgment because every disputed case involves one or more such denials").

Rather, the focus of any summary judgment motion is whether there is a "genuine" factual dispute that requires resolution at a hearing. *See* Rule 102.24(b). MTC's motion is premised on the facts *as alleged* by counsel for the General Counsel in the Complaint, and MTC contends that those facts, if true, do not amount to a violation of Section 8(a)(5) the Act. Thus, the issue presented by MTC's motion is the straightforward legal question as to whether the facts as alleged in the Complaint amount to an unlawful unilateral change.

The CGC's reliance on MTC's denials in its Answer demonstrates only that there is no "genuine" dispute. Had MTC misstated the factual theory of the Complaint, the CGC presumably would have said so. *See e.g.*, Rule 102.24(b) (explaining that a party opposing a motion for summary judgment can rely on *that party's* pleadings to demonstrate the existence of a genuine issue). Instead, CGC claims that there is a "genuine dispute" as to whether MTC's sick leave and vacation policy applied to the circumstances of this case. *See* Opposition, p. 5. But that is a legal question, not a factual one. CGC does not dispute that the policy represented the status quo. Whether the policy applied to employees who needed to quarantine is precisely the type of issue that can and should be resolved via summary judgment.

The cases cited by CGC in support of this argument are not to the contrary. Both cases involved information requests, and in both cases, the Board denied summary judgment due to actual disputes of fact. In *Kiro, Inc.*, 311 NLRB 745 (1993), there were disputes of fact as to whether the information sought by the union was limited to financial information and relevant. Similarly, in *Postal Serv.*, 311 NLRB 254 (1993), the Board denied the General Counsel's motion for summary judgment because there was a dispute of fact as to whether the union was entitled to the requested information: attendance records for non-unit employees. Neither case states or suggests that counsel for the General Counsel can rely on MTC's Answer to manufacture a dispute of fact when the motion for summary judgment is based on the Complaint allegations.

2. Respondent made no substantial or material change to the status quo.

Not only is there no genuine dispute of fact, the CGC's Opposition presents no argument on the merits against the entry of summary judgment. To prove a violation of the Act as alleged in the Complaint, counsel for the General Counsel has to prove that MTC made a unilateral change in terms and conditions of employment that is "material, substantial, and significant" without first bargaining with the union. *See, e.g., Rust Craft Broadcasting of New York, Inc*. 325 NLRB 327 (1976). Other than generically claiming that there is a dispute of fact, CGC does not even bother to engage on the merits of whether MTC maintained the status quo by applying the existing sick leave and vacation policy to employees required to quarantine. *See* Opposition, p. 5.

To the contrary, the CGC implicitly concedes that MTC followed its existing policy by attempting to recast the theory of the Complaint. Although the Complaint alleges that Respondent failed to bargain over changes to "existing terms and conditions" by requiring

employees to quarantine without pay, *see* Complaint, ¶13(b), CGC claims that the issue is whether it "would previously have been understood" that MTC's existing sick leave and vacation policy would be applied in this circumstance. Opposition, p. 5. While convoluted, the gist of the CGC's theory is not that MTC made changes to its existing paid leave policies, but that it should have bargained about the *effects* of those policies. But CGC does not and could not allege that the union ever demanded effects bargaining or that MTC ignored any such demand.

3. Respondent had no discretion in implementing state law requirements relating to COVID-19 and thus, no obligation to bargain.

CGC concedes that MTC was complying with governmental guidelines in requiring employees to quarantine, and cites some of the cases cited by Respondent in support of the proposition that an employer is relieved from the obligation to bargain where a specific change in terms and conditions is mandated by law. *See Murphy Oil USA*, 286 NLRB 1039, 1042 (1987); *Standard Candy Company*, 147 NLRB 1070, 1073 (1964). However, CGC argues that MTC had discretion in implementing those guidelines and thus had an obligation to bargain over them, citing to other cases. *Hanes Corp.*, 260 NLRB 557 (1982); *Dickerson-Chapman, Inc.*, 313 NLRB 907 (1994).[1]

None of the cases is applicable here. In *Hanes Corp*., the Board found that the respondent should have bargained with the union over the type of respirator it selected to comply with an OSHA-mandated respirator program, where it had the discretion to choose the type. 260 NLRB at 562-563. In *Dickerson-Chapman, Inc*., the Board found that the respondent's failure to consult with the union regarding the OSHA-mandated designation of "competent persons" was unlawful, where the selection methodology remained discretionary. 313 NLRB at 907. Here,

[1] CGC also cites to *Christopher Street Owners Corp.*, 294 NLRB 277 (1989). That case is wholly inapplicable to the question of whether an employer is obligated to bargain over a legal requirement.

however, the Massachusetts COVID-19-related orders did not give MTC discretion in how to handle employees who reported having been exposed to a COVID-19 positive individual. The Commonwealth of Massachusetts mandated that such employees were not allowed to report to work and must quarantine for 14 days. [2] *See* Exhibit N to MSJ. An employer could not be open in Massachusetts during the pandemic unless it complied with these standards. *See* Exhibit Q to MSJ. While CGC theorizes that there is a dispute of fact about this, nowhere in its Opposition does CGC explain what aspects of these rules were discretionary rather than mandatory. And for good reason. A hearing is not necessary to determine whether an executive order by the Governor of Massachusetts and the associated "mandatory safety standards" were mandatory or discretionary.

CONCLUSION

For these reasons, counsel for the General Counsel has provided no basis for finding that a genuine issue of fact exists. Accordingly, based on the unrebutted legal arguments set forth in MTC's Motion for Summary Judgment, the Board should find in MTC's favor on its Motion and dismiss the Complaint in its entirety.

[2] https://www.mass.gov/info-details/reopening-mandatory-safety-standards-forworkplaces#staffing-and-operations

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2021, a true copy of **Respondent's Reply in Support of its Motion for Summary Judgment** was electronically filed with the Office of the Executive Secretary via the National Labor Relations Board's E-Filing system. I further certify that I caused the foregoing document to be served through electronic mail delivery in accordance with Board Rules & Regulations Rule 102.114 upon:

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